

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY D. RICE)	
Claimant)	
VS.)	
)	Docket No. 195,918
KANSAS LABOR, INC.)	
Respondent)	
AND)	
)	
KANSAS BUILDING INDUSTRY WC FUND)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from an Award entered by then Assistant Director Brad E. Avery on August 5, 1998. The Appeals Board heard oral argument on March 3, 1999.

APPEARANCES

Stanley E. Oyler of Topeka, Kansas, appeared on behalf of claimant. Matthew S. Crowley of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the transcripts of the preliminary hearings held June 30, 1997, and June 25, 1998, which were not listed in the Award.

ISSUES

The Assistant Director awarded benefits based on a 16 percent permanent partial disability to the body as a whole. The disability was based on functional impairment from a back injury.

On appeal, respondent contends the Assistant Director erred in finding the injury arose out of and in the course of employment. Respondent challenges claimant's credibility and asserts the injury was a preexisting condition resulting from prior injuries.

In the event the Board finds the injury arose out of and in the course of employment, respondent disputes the extent of disability awarded and argues the award should be reduced by preexisting disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be affirmed.

Findings of Fact

1. Claimant worked for respondent from May 9, 1994, to September 30, 1994. On August 1, 1994, he injured his low back lifting cabinets in the course of his employment for respondent.
2. Respondent provided medical treatment with Dr. Sergio Delgado. Dr. Delgado first saw claimant August 9, 1994. He recommended limitation of work activity, muscle relaxants, and pain medication. He also ordered an MRI. From the MRI results, he diagnosed a herniated disc at L4-5 on the left. Dr. Delgado prescribed cortisone injections and at the last visit for treatment on March 31, 1995, Dr. Delgado discussed surgery as an option.
3. Dr. Delgado saw claimant again for an evaluation at the request of respondent's counsel on May 23, 1996. He again diagnosed a herniated disc. He rated the impairment as 12 percent of the whole person with 6 percent of the 12 percent related to work at respondent and the other 6 percent preexisting. Dr. Delgado had reviewed treatment records from back problems claimant had before this injury and concluded, based on the records of Dr. Ronald K. Warta, a chiropractor, that claimant's earlier complaints were compatible with herniated disc. Specifically, he noted from Dr. Warta's records that claimant had a positive straight leg raise test with pain into the left foot.
4. Dr. P. Brent Koprivica also evaluated claimant's injury. He performed an independent medical examination at the request of the Administrative Law Judge. He rated the impairment as 16 percent of the whole body. He did not assess any of the impairment to preexisting problems, but he had not seen the records of the prior back treatment. When shown the records, he testified he did not think claimant had a preexisting impairment. He noted records of Dr. Warta which indicated the prior symptoms had resolved as of December 20, 1993. He did not agree that Dr. Warta's records of prior treatment indicated a preexisting herniated disc. Dr. Koprivica attributed the herniated disc to the accident in August 1994.
5. Claimant left employment with respondent September 30, 1994. At the time of the regular hearing in this case, he was working for Sunshine Recycling earning \$425 per week, a wage higher than the wage he was earning for respondent.

6. Based on the records and opinion of Dr. Koprivica, the Board finds claimant did not have a preexisting functional impairment.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board finds claimant has proven accidental injury arising out of and in the course of his employment. Respondent contends claimant has not proven that he suffered accidental injury arising out of and in the course of his employment. Respondent notes: (1) there were no witnesses to the accident; (2) coworkers testified they did not notice claimant exhibit any problems working after the alleged accident; (3) claimant had back problems before the alleged accident; and (4) on questionnaires completed for a subsequent employer, claimant provided information which was inconsistent with the current claim of injury. Respondent also introduced videotape of claimant working for another employer after the injury. The Board, nevertheless, finds claimant's testimony about the accident to be credible. The coworkers also acknowledged they did not have the significant opportunity to observe claimant after the accident. The medical records reflect that claimant's earlier back problems had resolved before this accident. The MRI provides objective evidence of a current injury. Both testifying physicians, Dr. Delgado and Dr. Koprivica, concluded claimant had injured his back as he claimed.

3. The Board agrees with and affirms the finding that claimant has a 16 percent disability. This conclusion is based on the independent medical examination by Dr. Koprivica.

4. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment, but the Board concludes claimant did not have a preexisting functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by then Assistant Director Brad E. Avery on August 5, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley E. Oyler, Topeka, KS
Matthew S. Crowley, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director